

**Office of Chief Counsel
Internal Revenue Service**

memorandum

CC:LM:FS:HAR:POSTF-156797-01
CJSantaniello

date: OCT 24 2001

to: Robert McCalister, Senior Team Coordinator, Norwalk, CT, Group 1541

from: Associate Area Counsel, LMSB, Area 1 (LM:FS:HAR)

subject: **Large Case Advisory Opinion -** [REDACTED]

This memorandum responds to your request for assistance dated October 16, 2001. This memorandum should not be cited as precedent.

In your memorandum, you request our legal advice regarding whether a statute extension for [REDACTED] and [REDACTED] under a Form 872-A can be continued by executing a Form 872 for those years, followed by the termination of the Form 872-A. For the reasons set forth below, an extension of the statute of limitations on assessment for [REDACTED] and [REDACTED] in accordance with a Form 872-A may be continued without interruption upon the execution of a Form 872 and Form 872-T for those same years. To protect the government's interest, and as an added safeguard against any misunderstanding regarding the parties intentions, we recommend that language be included in the Form 872-T regarding the parties' desire that the statute of limitations be continued without interruption to the date set specified in the Form 872.

Issue

Whether a statute extension for [REDACTED] and [REDACTED] under a Form 872-A can be continued without interruption by executing a Form 872, followed by the termination of the Form 872-A. U.I.L. No. 6501.08-00

Facts

The examination of [REDACTED]'s consolidated Forms 1120 for the years [REDACTED] through [REDACTED] was closed to review in [REDACTED]. According to the proposed Form 870, [REDACTED] overpaid its tax for the years [REDACTED] through [REDACTED] totaling \$[REDACTED], and underpaid its tax for [REDACTED] by \$[REDACTED]. The statute of limitations on assessment for [REDACTED] and [REDACTED] is protected by Form 872-A. The limitations period for [REDACTED] through [REDACTED] is extended to [REDACTED] under a Form 872. To date, the case remains unclosed.

As a result of the examination of [REDACTED]'s taxable years [REDACTED] through [REDACTED], [REDACTED] is entitled to additional capital loss carrybacks to the [REDACTED] and [REDACTED] years. Consequently, [REDACTED] desires to file amended returns for those years. The examination team, however, has been unable to locate [REDACTED]'s [REDACTED] through [REDACTED] Forms 1120,^{1/} and is, therefore, unable to allow the additional carryback. Consequently, [REDACTED] has requested additional time to perfect its claim. To achieve this result, [REDACTED] desires to substitute a Form 872 for [REDACTED] and [REDACTED] for the Form 872-A presently in effect for those years. In doing so, the limitations period would be extended to [REDACTED] for [REDACTED] and [REDACTED], to coincide with the Form 872 extending the limitations period for [REDACTED] through [REDACTED].

Section 6501(a)^{2/} states the general rule on the period of limitation for assessment of tax, and requires the Service to assess tax due within three years after the return was filed. Section 6501(c) provides several exceptions to the general rule. Specifically, section 6501(c)(4) provides that the Service and taxpayers may enter into an agreement to extend the limitations period on assessment, provided the agreement is executed before the expiration of the period of assessment under section 6501(a), or as previously extended under section 6501(c)(4). Section 6501(c)(4), therefore, expressly provides for successive agreements.

Section 6511(a) generally provides that claims for refund of an overpayment of any tax shall be filed by the taxpayer within three years from the time the return is filed or two years from the time the tax was paid, whichever of such periods expires later. Section 6511(c) provides several exceptions to the general rule. In particular, section 6511(c)(1) provides that if the Service and

1/ It is believed that the files for those years were destroyed in the collapse of the World Trade buildings on September 11, 2001.

^{2/} All statutory section references are to the Internal Revenue Code in effect during the taxable years at issue.

a taxpayer have entered into an agreement to extend the period of limitations for assessment of tax pursuant to section 6501(c)(4), the period for filing a claim for refund shall not expire before six months after the expiration of the extended period for assessment.

Section 6511(d)(2)(A) provides that if a claim for overpayment is attributable to a capital loss carryback, the period prescribed in subsection (a) is the period which ends three years after the due date of the return (including extensions thereof) for the taxable year of the net capital loss which results in the carryback, or the period prescribed in subsection 6511(c) in respect of such taxable year, whichever expires later.

Form 872-A extends the period of limitations to a date ninety days after (1) the Service office considering the case receives Form 872-T from the taxpayer; (2) the Service mails Form 872-T to the taxpayer; or (3) the Service mails a notice of deficiency for the period covered by the Form 872-A.

In this case, [REDACTED] proposes to substitute a Form 872 for the Form 872-A, extending the limitations period for [REDACTED] and [REDACTED] to [REDACTED]. This would necessarily entail the termination of the Form 872-A by either the Service's or [REDACTED]'s mailing of Form 872-T, preceded by the execution of the Form 872.^{3/} According to the taxpayer, substituting a Form 872 for the Form 872-A will extend the limitations period for those years beyond the time it will expire under the Form 872-A.^{4/}

Under section 6501(c)(4), "[t]he period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon." Although our research has not identified any case or ruling in which a Form 872-A was succeeded by a Form 872, we do not consider such circumstance to be outside the scope of section 6501(c)(4).

^{3/} Although Form 872 could be entered into either simultaneous with the execution of the Form 872-T or within the 90-day period thereafter, we recommend that the Form 872 be executed first.

^{4/} We are somewhat confused by this statement, as the limitations period under the Form 872-A will not expire, in the absence of a notice of deficiency, unless one of the parties mails Form 872-T for the years in question. As previously noted, [REDACTED]'s [REDACTED] through [REDACTED] taxable years have been resolved by the execution of a Form 870.

Accordingly, because the statute of limitations for [REDACTED] and [REDACTED] remains open under the valid Form 872-A, the Service and [REDACTED] may execute a Form 872, followed by the mailing of Form 872-T, to extend the limitations period to the date specified in the Form 872.

To protect the government's interest, and as an added safeguard against any misunderstanding regarding the parties intentions, we recommend that the following language be included in the Form 872-T:

This form does not terminate the Form 872, Consent to Extend Time to Assess Tax, dated _____, between the above taxpayer and the Internal Revenue Service, extending the statute of limitations on assessment until [REDACTED] for the kind of tax and tax periods specified above, which agreement supercedes the Form 872-A, Special Consent to Extend Time to Assess Tax, dated _____, between the above taxpayer and the Internal Revenue Service, extending the statute of limitations on assessment indefinitely for the kind of tax and the tax periods above. It is further understood that if the above Form 872 is deemed to be ineffective, inadequate, or otherwise invalid for any reason, then the Form 872-A shall continue in effect as though the Form 872-T were never mailed.

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if necessary, we will send you a supplemental memorandum incorporating any such recommendation.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

Since there is no further action required by this office, we will close our file in this matter ten days from the issuance of this memorandum or upon our receipt of written advice from the National Office, whichever occurs later.

Please call Carmino J. Santaniello at (860) 290-4075 if you have any questions or require further assistance.

BRADFORD A. JOHNSON
Associate Area Counsel
LMSB, Area 1

(Signed) Carmino J. Santaniello

By:

CARMINO J. SANTANIELLO
Attorney